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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ROBERT DARRYL WAR CLUB, Defendant.	CR 08-126-GF-SEH <u>TRIAL BRIEF</u>
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ANTICIPATED PROOF

A. Introduction

Dick Green was a pawnbroker. Green also dealt poker. Both were cash businesses, so Green always had cash on him because of the nature of his work. He carried it in his front pocket – “gambler’s law.” It was common knowledge in the community that Green had cash.

Green employed Richard Comes Last and Dale King to do odd jobs, such as work on cars. Green would take cars and car titles as collateral for loans. He also loaned them and others money. Green kept business records detailing the loans that he made and the payments that he received.

War Club was a former police officer and criminal investigator. War Club suffered a shoulder injury that curtailed his career. Because of pain related to the injury, War Club became addicted to prescription pills and eventually meth. War Club bought and sold pills and meth to feed his addiction. Before he murdered Green, he was convicted of three tribal drug offenses and a state forgery offense for forging a check to buy pills.

Six months before he murdered Green, War Club's work comp benefits were cut off. Before that time, War Club borrowed money from Green and made regular payments. After his benefits were cut off, War Club no longer made any payments and owed Green more money than any one else – \$2000 – at the time of Green's murder.

B. Finding the body

On April 20, 2006, at about 8:00 p.m., Stacey Nefzger discovered the dead body of her father, Dick Green, lying on the floor of his garage. Green's home was located near Wolf Point on the Fort Peck Indian Reservation in northeast Montana. Stacey found her father lying face down in a pool of his blood. Green had suffered multiple blunt-instrument-type injuries to his head. Green's death was caused by massive bleeding from multiple deep cuts and slashes to his neck. A red butterfly knife with Green's blood on it was found between his body and the garage door. That knife was consistent with being the weapon that caused the injuries to Green's neck. Green's front left pocket lining was pulled out, and his wallet, with only a check in it, was found in his back pocket.

Green was last seen alive during the early morning hours of April 20, 2006. He spent the night of April 19 and the early morning of April 20 dealing cards at a local establishment, the Cattleman's Cut. Green left the Cattleman's Cut at about 1:45 a.m. on April 20, 2006. He returned home at approximately . He had thousands of dollars in cash on him that night, which he carried in his front pocket.

C. April 20 after Green's murder

Numerous people were looking for Green all day on April 20, 2006. Richard Comes Last had an appointment with Green at Green's house at 10:00 a.m. that day. Comes Last, who often performed odd jobs for Green, went to Green's house with the expectation that he and Green would get a car ready that Green had sold to Harold Gleed. The night before, Comes Last delivered Gleed's check to Green at the Cattleman's Cut, and made arrangements for their meeting the next day. But, on the morning of April 20, Comes Last found the door to Green's garage closed, and Green did not answer his door or his phone. Comes Last tried to call Green multiple times with his cell phone—phone records confirm that he made several calls to Green starting at 10:33. Comes Last also called Green's wife, Betty, because it was

unusual that Green was not where he said he would be. Comes Last finally left Green's house, but he continued his attempts to contact Green throughout the day.

Dale King went to Green's house at 12:00 p.m. and again at 3:00 p.m., on April 20, looking for Green. Green did not answer the door, so King also tried to contact Green through Betty Green.

Betty Green spent much of April 20 working in her store in Wolf Point. She became worried after talking with both Comes Last and King, and after she could not reach Green by phone. She sent her brother-in-law, Charlie Brown, to Green's house. When Brown did not find Green either inside or outside the house, Betty returned to the house with Brown and her sister. After searching for Green, Betty called her stepdaughter, Stacey. Because the garage was locked, and because it was the only location that no one had been able to check, Stacey called Comes Last to ask him where her father kept the remote garage door opener. Stacey contacted Comes Last because she knew that Comes Last worked for her father, and she assumed that Comes Last would know where her father kept the remote.

Comes Last was on the phone with Stacey when Stacey discovered Green's body in his garage. Comes Last, who was attending a wake in a nearby town, immediately returned to Wolf Point. On the way, Comes Last called 911. When he got to Green's house, the police were already there. Comes Last called Green's brother, Tom, when he arrived at Green's house and saw that Green was dead.

D. War Club's behavior on April 20

Sometime before 10:00 a.m., on the morning of April 20, 2006, Arnold Douglas, a local emergency room nurse, saw War Club walking across an alley in Wolf Point. Douglas was parked in the driveway of his sister's house, Mildred Clancy. Douglas was in town to provide a urine sample to the local clinic, and he did so at 9:55 a.m. War Club asked Douglas for a ride to the post office. Douglas took War Club to the post office but, when they got to the post office, War Club asked Douglas to take him to a stoplight. War Club changed his mind again, stating that he wanted to be taken to another stoplight located near a hardware store. Then War Club asked to be taken to the edge of town. War Club said that he was going to hitchhike to Poplar, saying something about looking for work, so he asked Douglas to give him a

ride a little bit outside of town. War Club finally had Douglas drop him off at the approach to a home that Douglass later learned to be Dick Green's residence.

Douglas drove by Green's residence about an hour later when he was leaving Wolf Point. Douglas expected to see War Club hitchhiking toward Poplar, but when Douglas looked over at Green's residence as he drove by, he saw War Club standing outside talking to one or possibly two other people whom Douglas did not recognize.

E. Following the money on April 20 and 21 after the murder

Jennifer Haugen, War Club's niece, saw War Club shortly after Green's murder, between 3 a.m. and 4 a.m. on the morning of April 20. War Club had come to Haugen's house on the night of April 19 wanting to buy morphine pills, but Haugen would not sell him any pills because he did not have any money. When he came to her house again, during the early morning hours of April 20, he knocked on her bedroom window, waking her up, and he told her that he would pay her \$100 to simply come to the door. War Club now had money to buy pills. Haugen tried to "score" for him, meaning find some pills to sell him, but was unsuccessful in finding any pills for War Club to buy.

War Club made a phone call to Grace Devereaux at 12:41 p.m. on April 20, 2006. Devereaux confirmed the time from cell phone records. Devereaux went to War Club's house and sold him prescription pills, specifically four Oxycontin. War Club gave Devereaux five \$20 bills. War Club had purchased pills from Devereaux about fifty times in the past. But Devereaux remembered April 20 because War Club was acting strange, and she saw a large bulge in War Club's front left pocket that looked like a roll of money.

Later that same day, War Club went to the house of Arlie and Antoinette Shields with the intention of purchasing drugs. War Club had a roll of money, and Antoinette saw War Club give money to her father. Antoinette specifically saw about \$500 dollars in large bills. War Club told Antoinette that he had taken the money from somebody (he used the term "jack-rolled somebody"), and War Club told Arlie that he stole the money. Neither Arlie nor Antoinette had ever seen War Club with that much money before.

The day after the murder, War Club was in a local casino and cashed in two or three \$100 bills. Desiree Garfield, who served War Club at the casino that day, had never seen War Club with that much

money and she knew, through her relationship with War Club's wife, that at that point in time War Club was unemployed and his family was "hurting" for money.

F. War Club's behavior after the murder

Tom Green closed down his brother's pawn business after the murder. Green contacted all of the people that had cars and car titles in hock and made arrangements for them to pay their debt and pick up their cars. A couple of people contacted Green and decided not to pick up their cars but, instead, forfeit the cars to pay their debts. The War Club family had three cars in hock after the murder. The War Clubs were the only individuals that did not contact Green about their cars after the murder.

G. The Evidence

FBI agents conducted a search of War Club's house and recovered a red shirt. There was a red cotton fiber found on the gray shirt that Green was wearing when he was murdered collected from Green's autopsy. In 2005, fibers from War Club's red shirt were compared to the fiber recovered from the gray shirt and found to have the same microscopic characteristics and optical properties. That means that the

fibers came from shirts from the same manufacturer and dye lot that had been laundered and exposed to the sun equally.¹ Additionally, both Antoinette and Arlie Shields identified War Club's red shirt as the shirt that War Club was wearing when they saw him on April 20, the day of Green's murder. And Arnold Douglas identified the shirt as the one that War Club was wearing on April 20 when he was interviewed by an FBI agent shortly after the murder.

DNA testing revealed that a hair sample taken from Green's body bag is similar to the mitochondrial DNA type of a head hair sample taken from War Club's daughter, Crystal War Club. This means that due to the close relationship or similarity of these samples, Crystal War Club could not be excluded as being the source of the hair taken from Green's body bag. Crystal War Club was living with War Club at the time of Green's murder.

Don Sharp sold the red butterfly knife to War Club before Green's murder. His daughter, Aylissa Sharp, saw her father sell the knife to War Club, and confirmed the sale was before the murder. Julian

¹Because of the passage of time and the degradation of the samples, the fibers no longer share the same microscopic and optical properties.

Deserly remembered seeing War Club with the red knife, before Green's murder, and he specifically recalled War Club asking him to show him how to operate the blade of the red butterfly knife.

Both Antoinette and Arlie Shields saw War Club with the red butterfly knife before Green's murder.

DNA testing confirmed that the blood on the knife is Dick Green's blood.

ANTICIPATED WITNESSES

The United States anticipates calling approximately 30 witnesses in its case in chief. And, depending upon the defense case, the United States may call an additional 10 rebuttal witnesses.

The United States believes that it can complete its case in chief by close of business on Wednesday.

ANTICIPATED EXHIBITS

1. Tribal enrollment record for the defendant
2. Photographs of crime scene
3. Photographs of Green from autopsy
4. Green's pawn business records

5. Don Sharp's knife invoice and Bud K Worldwide purchase order and catalogue page
6. Surveillance tape from Green's house
7. Defendant's cell phone records
8. Devereaux's cell phone records
9. Comes Last's cell phone records
10. Roberta War Club's cell phone records
11. Dispatch records
12. Knife and packaging
13. Defendant's shirt
14. Fiber from Green's shirt
15. Green's jacket
16. Hair from body bag
17. Crystal War Club known hair sample
18. Demonstrative exhibit of Green's garage and overhead view of house and garage
19. Demonstrative exhibit of Wolf Point
20. Demonstrative exhibit of autopsy diagrams

The United States will attach copies of the proposed demonstrative exhibits to this trial brief. They will be available on poster boards for use at trial.

LEGAL ISSUES

War Club's testimony from September 2009 trial

Regardless whether War Club testifies at the re-trial, the United States can read into the record his testimony from the September 2009 trial in its case in chief. *United States v. Mortensen*, 860 F.2d 951 (9th Cir. 1988) (“A defendant’s testimony in a prior trial is normally admissible in subsequent proceedings.”); *Harrison v. United States*, 392 U.S. 219, 222, n.5 (1968)(citing *Edmonds v. United States*, 273 F.2d 108, 112 (D.C.Cir. 1959)). Nor does it matter whether the defendant testifies at the second trial, because “[t]he fact that the defendant does not take the stand at the second trial does not prevent the use of his testimony given at the former trial” *Edmonds*, 273 F.2d at 113; *see also United States v. Toombs*, __ F. Supp. 2d __, 2010 WL 5067617 at *2 (D. Kan.) Dec. 7, 2010) (detailing cases that have addressed admission of defendant’s prior testimony in subsequent trial).

Pending motion *in limine*

Pending is a motion requesting that the Court conduct a *Daubert* hearing and exclude the government's hair and fiber evidence. For the reasons set forth in the government's previously filed response, the United States does not believe a *Daubert* hearing is necessary. Nor should the evidence be excluded.

DATED this 12th day of April, 2011

MICHAEL W. COTTER
United States Attorney

/s/ Lori Harper Suek
Assistant U.S. Attorney